COPY

Supreme Court, U.S.
FILED

93 1809 MAY 12 1994

OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MAURICE DANCE, et al.
Petitioners,

v.

S. DAVID AVIEL
Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
ROBERT L. MUKAI
Chief Assistant Attorney General
MARVIN GOLDSMITH
Senior Assistant Attorney General
TYLER B. PON
Supervising Deputy Attorney General
PAUL T. HAMMERNESS
Deputy Attorney General
(Attorney of Record)
455 Golden Gate Ave., Ste. 6200
San Francisco, California 94102
Telephone: (415) 703-2081
Attorneys for Petitioners Maurice Dance, Jay Tontz, Wade Morehouse, Bruce MacNab, and Richard Zock

19 pp

QUESTION PRESENTED

1. May a plaintiff litigate pendent state law tort claims in federal court, despite the bar of the Eleventh Amendment, simply by naming State officials as defendants in their individual capacities?

LIST OF PARTIES

Petitioners: Maurice Dance, Jay Tontz, Wade Morehouse, Bruce MacNab and Richard Zock.

Respondent: S. David Aviel.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTIONAL GROUNDS 2

APPLICABLE FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

1. Nature of this Controversy; Proceedings Below. 2

2. Reasons for Granting this Petition 5

ARGUMENT 7

I REVIEW OF THIS CASE IS NEEDED TO PREVENT AN END RUN AROUND THE ELEVENTH AMENDMENT BY THE ARTIFICE OF "INDIVIDUAL CAPACITY" LAWSUITS AGAINST STATE OFFICIALS ON STATE LAW CLAIMS 7

TABLE OF CONTENTS (CONT'D.)

Page(s)

ARGUMENT (CONT'D.)

II REVIEW BY CERTIORARI IS NECESSARY TO ENFORCE A UNIFORM RULE OF GREAT NATIONAL IMPORTANCE 9

CONCLUSION 13

TABLE OF AUTHORITIES

	Page
Cases:	
Atascadero State Hosp. v. Scanlon 473 U.S. 234 (1985)	11
Ex parte Young 209 U.S. 123 (1908)	7, 8
Ford Motor Co. v. Department of Treasury 323 U.S. 459, 464 (1945)	8
Hays County Guardian v. Supple 969 F.2d 111, 125 (5th Cir. 1992)	6, 10
Huang v. Board of Governors 902 F.2d 1134, 1138 (4th Cir. 1990)	6, 10
Jackson v. Georgia Dept. of Transp. 16 F.3d 1573 (11th Cir. 1994)	6, 10
Maine v. Thiboutot 448 U.S. 1, 9n. 7 (1980)	10
Montana v. Peretti 661 F.2d 756, 758 (9th Cir. 1981)	11

TABLE OF AUTHORITIES (CONT.D)

Page(s)

Cases (Cont.d)

Pena v. Gardner
976 F.2d 469 (9th Cir.1992) 5, 9

Pennhurst State School & Hospital v. Halderman
465 U.S. 89 (1984) 5, 6, 9

Ronwin v. Shapiro
657 F.2d 1071 (9th Cir. 1981) 5

Constitutional Provisions:

28 U.S.C. § 1254(3) 2

42 U.S.C. § 1983 3

Cal. Govt. Code § 800 11

Cal. Govt. Code § 825 4, 12

Other Authorities

Van Alstyne, *California Government Tort Liability Practice*, § 5.89, at 593-94 (1980 ed.) 11

No.

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1994

MAURICE DANCE, et al.
Petitioners,
v.
S. DAVID AVIEL
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The relevant decision of the United States Court of Appeals for the Ninth Circuit is set forth at Appendix A-1 to A-7. The relevant decision of the United States District Court is set forth at Appendix A-8 to A-17.

JURISDICTIONAL GROUNDS

The unpublished decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on April 14, 1994. This petition for writ of certiorari is due on or before May 14, 1994.

This Court has jurisdiction to review the lower court's decision by writ of certiorari under 28 U.S.C. § 1254(3).

APPLICABLE FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, Eleventh Amendment:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT OF THE CASE

1. Nature of this Controversy; Proceedings Below.

This civil rights action for damages under 42 U.S.C. § 1983 was brought by Professor S. David Aviel, ("respondent") who sued the State of California and five administrators ("petitioners") at California State University

at Hayward ("CSUH") for violating his civil rights under 42 U.S.C. § 1983 and for several pendent state law claims.

Respondent claimed that petitioners attempted to discipline him in retaliation for a lawsuit he filed against CSUH in 1989. Petitioners were high-level administrators and respondent's supervisors at the University: Dr. Dance, President of the University; Dr. Jay Tontz, Dean of the Business School; Dr. Wade Morehouse, Associate Dean; and Prof. Richard Zock, Chairman of respondent's department.

The pendent state law claims sought to hold the State and petitioners liable in damages for the alleged retaliation, under several tort law theories - including defamation, invasion of privacy, infliction of emotional distress and breach of contract. When the issue of the Eleventh Amendment immunity of the State was raised, respondent voluntarily dismissed it from the action; but left in, as defendants, the petitioners. The pendent state law claims all alleged that petitioners were acting in the course and scope of their State employment when they allegedly committed the torts. The district court granted summary judgment for petitioners on the section 1983 claims and dismissed the pendent state claims on Eleventh Amendment grounds, petitioners having established that any judgment for damages would directly impact the State's treasury, by virtue of the provisions of Cal. Govt.

Code § 825.[1/] (Memorandum and Order, App. to Pet. Writ of Cert., at A-14 - A-15).

---

1. Cal. Gov't Code § 825 provides in relevant part: "If an employee or former employee of [the State] request the [State] to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the [State] and such request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the [State] shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the [State] has agreed.

   If the [State] conducts the defense of an employee or former employee against any claim or action with his reasonable good faith cooperation, the [State] shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the [State] has agreed; but, where the [State] conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the [State] not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the [State], the [State] is required to pay the judgment, compromise or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the [State].

   Nothing in this section authorizes the [State] to pay such part of a claim or judgment as is for punitive or exemplary damages."

On appeal, the Ninth Circuit affirmed the granting of summary judgment on the § 1983 claim, but reversed the dismissal of the pendent state law claims on Eleventh Amendment grounds. The Ninth Circuit, in effect, held that a plaintiff-respondent could avoid the bar of Eleventh Amendment immunity simply by the artifice of naming State officials as defendants in their individual capacities. (Memorandum, App. to Pet. Writ of Cert., at A-5 - A-6). Despite this Court's clear direction to the contrary in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Ninth Circuit held Eleventh Amendment immunity was not applicable (*Id.* at A-5).[2/]

2. Reasons for Granting this Petition.

This decision by the Ninth Circuit extends an erroneous doctrine first announced by it in *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981) and recently reaffirmed by it in *Pena v. Gardner*, 976 F.2d 469 (9th Cir. 1992). In *Pennhurst*, this Court explained the importance of distinguishing between federal and state law claims in evaluating the reach of the Eleventh Amendment immunity, a distinction which is crucial to the system of Federalism: "A federal court's grant of relief against State officials on the basis of state law, whether prospective or

---

2. The Ninth Circuit relied upon a dictum of Yale's Professor Tribe in overruling petitioners' claim to Eleventh Amendment immunity as to the pendent State law claims. Memorandum, App. to Pet. Writ of Cert., at A-6, quoting L. Tribe, *American Constitutional Law* 132-33 n. 22 (1978). With all due respect to Professor Tribe, it is *this* Court which says what the Constitution is.

retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on State sovereignty than when a federal court instructs State officials on how to conform their conduct to State law." 465 U.S. at 106.

The error represented by the decision below is not sought to be corrected simply because it is wrong, and representative of a result which conflicts directly with the principles of federalism that underlie the Eleventh Amendment. The interpretation of the Ninth Circuit is not confined to it. At least two other circuits, and some district courts, have adopted this rationale, which is inimical to reasoned limits on Federal jurisdiction. *E.g., Jackson v. Georgia Dept. of Transp.*, 16 F.3d 1573 (11th Cir. 1994); *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir. 1992); cf. *Huang v. Board of Governors*, 902 F.2d 1134, 1138 (4th Cir. 1990) (*Pennhurst* bars claims for monetary relief based upon violations of state laws).

Given the conflict below in the circuit Courts of Appeal, resolution by the Court is necessary to resolve this important issue, which at its core, concerns the basic structure of Federalism.

Moreover, given the inconsistency of the lower court's ruling with *Pennhurst*, granting of this petition is necessary so that this Court may exercise its supervisory powers to correct the lower courts' failure to heed its mandates. The lower courts should not, under the guise of interpreting this Court's rulings, be allowed to substitute

rules of constitutional law, however academically correct, in place of and contrary to those announced by this Court.

ARGUMENT

I

REVIEW OF THIS CASE IS NEEDED TO PREVENT AN END RUN AROUND THE ELEVENTH AMENDMENT BY THE ARTIFICE OF "INDIVIDUAL CAPACITY" LAWSUITS AGAINST STATE OFFICIALS ON STATE LAW CLAIMS

The doctrine of *Ex parte Young*, 209 U.S. 123 (1908) allows federal court § 1983 claimants to obtain relief for alleged violations of federal constitutional law. Under the *Ex parte Young* doctrine, individual capacity lawsuits against State officials can proceed despite the bar of Eleventh Amendment immunity, under the fiction, necessary to ensure the supremacy of federal law, that the officials' illegal conduct is *ultra vires*. 209 U.S. at 160.

It was undisputed below that the effect of any judgment on respondent's state law tort claims would, by virtue of the provisions of state law, be paid directly out

of the State's treasury.[3] *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945) ("[W]hen the action is in essence one for the recovery of money from the State, the State is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit."); *Pennhurst, supra*, 465 U.S. at 101.

This Court noted that the *ultra vires* doctrine of *Ex parte Young* could not be extended to state law claims merely by the use of clever verbiage:

> "Under the dissent's view of the ultra vires doctrine, the Eleventh Amendment would have force only in the rare case in which a plaintiff foolishly attempts to sue the State in its own name, or where he cannot produce some state statute that has been violated to his asserted injury. Thus, the ultra vires doctrine, a narrow and questionable exception, would swallow the general rule that a suit is against the State if the relief will run against it."

Id. at 116.

---

3. The district court stated:

> "Defendants have now shown that any judgment against them will be paid by the State of California pursuant to California Government Code § 825. A judgment against defendants would thus be a judgment against the State of California under the meaning of *Pennhurst*. This Court therefore cannot hear plaintiff's state law claims."

Memorandum and Decision, App. to Pet. Writ of Cert., at A-15.

Here, respondent was not so foolish as to continue his suit against the State directly. And, the lower court held that the Eleventh Amendment would not apply to the pendent state law claims against these officials, despite the direct, unquestioned impact of a judgment on the State treasury. (Memorandum, App. to Pet. Writ of Cert., at A-6). This end run around the Eleventh Amendment cannot be squared with *Pennhurst*, and must be overturned.

II

REVIEW BY CERTIORARI IS NECESSARY TO ENFORCE A UNIFORM RULE OF GREAT NATIONAL IMPORTANCE

The importance of Eleventh Amendment immunity of the States has been repeatedly emphasized by this Court in its decisions, as the very linchpin of our Federal system of government. *Pennhurst*, 465 U.S. at 98: "In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III..."

However, not only in this case, but in other decisions, the Ninth Circuit and other courts of appeal have allowed an "end run" around the Eleventh Amendment, by extending the legal fiction of "individual capacity" lawsuits to state law claims against State officials in federal court damage actions. *Pena v. Gardner*, 976

F.2d 469 (9th Cir. 1992); *Jackson v. Georgia Dept. of Transp.*, 16 F.3d 1573 (11th Cir. 1994); *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir. 1992).[4/]

The rationale of these circuits courts, in rejecting the States' claim to Eleventh Amendment immunity where their indemnification statutes require the payment of any judgments against their employees, rests upon a faulty premise. The assumption of these decisions is that, if Eleventh Amendment immunity is extended in this circumstance, the plaintiff will be deprived of a remedy. E.g., *Jackson,* 16 F.3d at 7; Memorandum, App. to Pet. Writ of Cert., at A-6.

These decisions overlook the true nature and effect of Eleventh Amendment immunity, which has no effect on the continued viability of a claimant's remedy in state court. *Maine v. Thiboutot,* 448 U.S. 1, 9 n.7 (1980). The sole effect of the Eleventh Amendment is to confine a claimant to a state forum: the claimants remedy remains unimpaired, even if the immunity applies. And, contrary to the suggestion of these federal courts, the State indemnification statutes were not designed as a means for

---

4. These decisions conflict with other circuit decisions following *Pennhurst*, e.g. *Huang v. Board of Governors*, 902 F.2d 376, 378 (5th Cir. 1990).

the States to avoid liability for their officials' wrongs, but were enacted to guarantee the payment of such claims, in state court.[5] These statutes also prevent discouragement of public officials' diligent performance of their duties, by protecting them against personal financial losses, while providing the injured claimant with a solvent source for satisfaction of judgment.

It is incongruous, to say the least, that the limited waiver of sovereign immunity by the States represented by these indemnification statutes, is now the lever for a wholesale abrogation of their Eleventh Amendment immunity. Such a result is contrary to the rule, well-established in Eleventh Amendment jurisprudence, that a State's consent to be sued for damages in state court does not waive its immunity from suit in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Montana v. Peretti*, 661 F.2d 756, 758 (9th Cir. 1981).

---

5. Van Alstyne, *California Government Tort Liability Practice*, § 5.89, at 593-94 (1980 ed.). The late Prof. Van Alstyne was one of the members of the California Law Revision Commission which drafted the California Tort Claims Act, Cal. Govt. Code § 800 et seq.

The nationwide importance of this issue is a function of the widespread legislation by the several States Code § 825.[6] If the rationale of these decisions of the circuit courts remains uncorrected, the States will be opened wide to federal court litigation, in a result inimical to the purposes of Federalism sought to be protected by the Eleventh Amendment.

Under these circumstances, it appears necessary for the Court to establish and enforce a uniform national rule of Eleventh Amendment immunity by granting the petition in this case, and reversing the decision below.

---

6. E.g., Fla. Stat. Ann. § 768.28 (state assumes liability for wrongs of employees within scope of employment and creates insurance trust fund to pay judgments); 5 Ill. Comp. Stats. Ann. 350/2(d) (state provides for indemnity for employees' acts within scope of employment); Mass. Gen. Laws ch. 258, § 9 (indemnification of employees); N. J. Rev. Stat. § 59:10-1 (indemnity); N. Y. Ct. Cl. Act § 20-a (payment of claims against state employees); Ohio Rev. Code Ann. § 2743.02 (state assumes liability for acts and omissions of state employees).

CONCLUSION

For all of the above-stated reasons, the decision of the Ninth Circuit should be reviewed by certiorari, and reversed.

DATED: May 9, 1994.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
ROBERT L. MUKAI
Chief Assistant Attorney General
MARVIN GOLDSMITH
Senior Assistant Attorney General
TYLER B. PON
Supervising Deputy Attorney General

Paul T. Hammerness

PAUL T. HAMMERNESS
Deputy Attorney General
(Attorney of Record)

Attorneys for Petitioners Maurice Dance, Jay Tontz, Wade Morehouse, Bruce MacNab and Richard Zock